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# Second report on State responsibility

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**Addendum**

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# II. Review of draft articles in Part One (continued)

## B. Part One, Chapter IV: Implication of a State in the internationally wrongful act of another State

### 1. Introduction

#### (a) The scope of Chapter IV

157. In accordance with the general principle stated in article 3, State responsibility arises when conduct attributable to a State breaches an international obligation of that State. But there may be cases where conduct of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One seeks to define the exceptional cases where this is so.

158. Three situations are covered in Chapter IV. Article 27 deals with what in national law would be termed "complicity", i.e. where one State provides aid or assistance to another State, thereby facilitating the commission of a wrongful act by the latter. Article 28 (1) deals with cases where one State is responsible for the internationally wrongful act of another State because it has assumed powers of direction or control over the latter, e.g., by treaty, or as a result of belligerent occupation of the latter's territory. Article 28 (2) deals with the extreme case where one State deliberately coerces another into committing an act which is or (but for the coercion) would be an internationally wrongful act on the part of the coerced State.[351] In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is (or but for the coercion, would be[352]) a breach of that State's international obligations. The "implication" of the second State in that breach arises from the special circumstance of its willing assistance in, its direction or control over, or its coercion of the conduct of the acting State. But there are also important differences between the three cases. Under article 27, the primary wrongdoer is the acting State and the assisting State has a supporting role. By contrast, in the case of coercion under article 28 (2), the coercing State is the *fons et origo* of the conduct, and the coerced State is its instrument. As formulated, article 28 (1) deals with a spectrum of cases, ranging from those where direction or control has actually been exercised by the dominant State, with the subordinate State merely following orders, to cases where the initiative has been taken by the latter and the responsibility of the dominant State derives merely from the failure to exercise a "power of direction or control".

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[351] For the *travaux* of article 27 see: Ago, Seventh Report, *Yearbook ... 1978*, vol. II, Part 1, pp. 52–60; *Yearbook ... 1978*, vol. I, pp. 232–237 (plenary debate); ibid., pp. 269–270 (report of Drafting Committee). For the *travaux* of article 28, see Ago, Eighth Report, *Yearbook ... 1979*, vol. II, Part 1, pp. 4–27; *Yearbook ... 1979*, vol. I, pp. 4–31 (plenary debate); ibid., pp. 169–174 (report of Drafting Committee). For discussions of the problem see M. L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Giuffrè, Milan, 1990); I. Brownlie, *State Responsibility. Part I* (1983) 189–192; J. Quigley, "Complicity in International Law: A New Direction in the Law of State Responsibility" (1986) 57 *British Year Book of International Law* 77; J. E. Noyes & B. D. Smith, "State Responsibility and the Principle of Joint and Several Liability" (1988) 13 *Yale Journal of International Law* 225; B. Graefrath, "Complicity in the Law of International Responsibility" (1996) 29 *Revue belge de droit international* 370 (which is especially useful). Earlier discussions of State "complicity" in the literature and the case law were concerned rather with problems of attribution or of the substantive standard of responsibility for the acts of private persons: see, e.g., J. L. Brierly, "The Theory of Implied State Complicity in International Claims" (1928) 9 *British Year Book of International Law* 42.

[352] This qualification is necessary because, if a State has really been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 31 and below, para. 202.

**(b) Accessory responsibility and cognate concepts**

159. In his Seventh Report, Mr. Ago settled on two cases to be dealt with in the chapter. The first was participation by one State in the wrongful act of another. The second was "indirect responsibility" based on the relationship between a State which directs or compels a wrongful act and the State which performs it.[353] No general justification was, however, offered for dealing with these two cases as compared with others that might be envisaged, and the commentary is largely silent on the point. But it is useful to place the specific situations currently dealt with in Chapter IV in the broader context of cooperation between several States in the commission of internationally wrongful conduct. At least the following might be envisaged:

(a) *Joint conduct*. State A combines with State B in carrying out together an internationally wrongful act. For example, if two States combine to carry out a certain operation, they may be described as acting jointly in respect of the operation as a whole, although terms such as "joint", "joint and several", "solidary", derived from national legal systems, must be used with care;

(b) *Action via a common organ*. States A and B act together through a common organ in performing an act. In such a case,[354] the organ is at the same time an organ of both States, in accordance with article 5 of the draft articles, and the conduct is attributable to both;

(c) *Agency*. State A acts on behalf of or as agent for State B in carrying out internationally wrongful conduct, but nonetheless retains its own role and responsibility for the conduct of its own organs[355]. For example, State B may request State A to perform certain acts on its behalf in the exercise of the right of collective self-defence. If the acts in question exceed what is permitted by Article 51 of the Charter, it may be that both the requesting and the acting State are responsible;[356]

(d) *Independently wrongful conduct involving another State*. State A engages in conduct, contrary to its own international obligations, in a situation where another State is involved, and the conduct of the other State is relevant or even decisive in assessing whether State A has breached its own international obligations. For example, in *Soering v. United Kingdom*, the European Court of Human Rights held that the United Kingdom was responsible for extraditing a person to a State not a party to the European Convention, where he would suffer inhuman or degrading treatment or punishment.[357] Thus a State may be internationally responsible for its own conduct in allowing someone to be subjected to harmful treatment, even if the harmful treatment is inflicted on its own account by another State.[358] Or a State may be required by its own international obligations to prevent certain

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353 Ago, Seventh Report, *Yearbook ... 1978*, vol. II, Part One, pp. 52–53 (paras. 52–53).

354 Referred to by Ago, Seventh Report (1978) p. 54 (para. 58).

355 If the relevant organ of State A is "placed at the disposal" of State B, in the sense provided for in article 9 of the draft articles, then only State B will be responsible for the act in question. See First Report, A/CN.4/490/Add.5, para.233. But there are many cases where the organs of State A retain some control over the acts they perform as agent for another State, and are not merely acting ministerially. This was true, for example, of Australia in the *Case concerning Certain Phosphate Lands in Nauru, I.C.J. Reports 1992*, p.240.

356 Cf. *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) I.C.J. Reports 1986*, p. 14; *Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras) I.C.J. Reports 1988*, p. 69.

357 *Soering Case*, ECHR Ser. A, vol. 161 (1989), at pp. 33–36.

358 The *Soering* principle has been applied by the Court in subsequent cases, although with some care: see e.g., *Cruz Varas v. Sweden*, ECHR Ser. A, No. 201 (1991), *Vilvarajah v. United Kingdom*, ECHR Ser. A, No. 215 (1991).

conduct by another State, or at least to prevent the harm that would flow from such conduct;[359]

(e) *Voluntary assistance in the commission of a wrongful act.* State A in some way assists State B in carrying out conduct which violates State B's international obligations, for example by knowingly providing an essential facility, or by financing the activity in question. This is the situation addressed by article 27. It differs from the *Soering*-type situation in that here the reason why State A's conduct is wrongful is its relationship to the wrongful conduct of State B;[360]

(f) *Incitement of wrongful conduct.* State A incites or encourages State B to carry out internationally wrongful conduct, but without materially assisting it to do so;[361]

(g) *Direction, compulsion or coercion.* State A compels or coerces State B to carry out internationally wrongful conduct, or State B acts under the direction and control of State A in carrying out such conduct. These cases are addressed by article 28. So too is the case of a failure to prevent wrongful conduct by State B in a field in which State A had the power to direct or control State B;

(h) *Assistance given after the wrongful conduct.* State A assists State B in escaping responsibility for internationally wrongful conduct, or in maintaining the benefits of such conduct, but without having had any involvement in the wrongful conduct itself. This is known as an "accessory after the fact" in common-law terminology;

(i) *Conduct of several States separately causing aspects of the same harm or injury.* A further possibility is that parallel wrongful conduct of several States can contribute to causing loss which, if only one of those States had acted, might not have occurred. For example, several States might contribute to polluting a river by pollutants which are much more significant, collectively and in combination, than they would have been if only one of those States had engaged in the conduct.

160. These situations are not mutually exclusive but can combine in different ways. For example, the *Case concerning Certain Phosphate Lands in Nauru* concerned the responsibility of Australia towards Nauru for acts performed by it on the "joint behalf" of the three States (Australia, New Zealand, United Kingdom) which together constituted the Administering Authority for the Trust Territory of Nauru.[362] This was both a case of "joint" conduct (situation (a) above) and a case where in terms of day-to-day administration one of the States acted on behalf of the other two States as well as on its own behalf (situation (c) above).

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[359] Thus the basis of Albania's responsibility in the *Corfu Channel* case was its failure to warn of the presence of mines in its waters which had been laid by a third State. See *I.C.J. Reports 1949*, p. 4.

[360] In *Soering*, the Court stressed that the conditions in the receiving country were considered as a question of fact. It said: "[T]here is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. Insofar as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment": ECHR Ser. A, vol. 161 (1989), at p. 36. Indeed it may be that, so far as the receiving State is concerned, the treatment in question is internationally lawful.

[361] See Ago, Seventh Report (1978), pp. 54–56 (paras. 61–65), arguing against mere incitement as a basis for responsibility. There are specific treaty obligations on States to prohibit incitement in certain contexts (e.g. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. III (e); International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, art. 4 (incitement to racial hatred or discrimination)).

[362] *I.C.J. Reports* ..., p. 240.

161. A special kind of "collective" conduct occurs where several States cooperate in establishing and maintaining an international organization to act on their behalf or, conversely, where one or more States acts on behalf of an international organization for some purpose of the organization. This raises questions of the extent to which the States concerned may be responsible either for the acts of the organization, or for the acts of individual member States carried out with its authority. For reasons explained above, however, the draft articles should not deal with cases of the responsibility of international organizations, or of member States for the acts of international organizations (including what may be termed "secondary responsibility").[363] Thus it is not necessary to consider such questions as who is responsible for the performance of mixed agreements of the European Union, where both the European Community and its member States are parties to the agreement and issues of the division of competence arise.[364]

162. Setting to one side issues of the responsibility of or for the acts of international organizations, the question is which of the cases surveyed above should be dealt with in the draft articles, and specifically in Chapter IV. According to articles 1 and 3, each State is responsible for its own conduct, i.e., for conduct, attributable to it under Chapter II, which is in breach of its own international obligations, the element of breach being specified in Chapter III. The question is then to identify, from the different forms of joint or concerted actions of several States identified in paragraph 159 above, those which are not adequately resolved by this general principle. It seems that situations (a), (b), (c), (d) and (i) do not raise any particular problems for the purposes of Part One of the Draft articles, although they may raise issues under Part Two as to the extent of reparation which each State is to bear. That leaves situations (e), (f), (g) and (h). Chapter IV proceeds on the basis that incitement of wrongful conduct (situation (f)) and assistance to a State after the conduct in question has been committed (situation (h)) are not generally wrongful in international law, or at any rate do not call for treatment in Part One.

163. It is, however, necessary to consider the situations actually covered by articles 27 and 28 before asking whether any additional cases of collective, ancillary or inchoate responsibility should be dealt with, in Chapter IV or elsewhere.[365]

### (c) Chapter IV as a statement of secondary rules?

164. One obvious feature of article 27, and perhaps also of article 28, is that they specify that certain conduct is internationally wrongful. Article 27 says that aid or assistance "itself constitutes an internationally wrongful act", while article 28 says that the international responsibility of one State is entailed by the wrongdoing of another in certain cases. Yet the draft articles are based upon a distinction between primary and secondary rules, and it is not their function "to define a rule and the content of the obligation it imposes".[366]

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[363] See First Report, A/CN.4/490/Add. 5, paras. 234, 262, and draft article A as proposed by the Drafting Committee in 1998. In the *Phosphate Lands case* it was agreed that the "Administering Authority" for Nauru was not a separate legal person, i.e., it was not an international organization distinct from the three participating States: see *I.C.J. Reports 1992*, p. 240, at p. 258.

[364] See I. MacLeod, I. D. Hendry and S. Hyett, *The External Relations of the European Communities* (Clarendon Press, Oxford, 1996), pp. 158–160; C. Tomuschat, "Liability for Mixed Agreements", in D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements* (Kluwer, Deventer, 1983), pp. 125–132. For judicial authorities, see opinion of Jacobs A-G in *Case C-316/91. European Parliament v. Council of the European Union* [1994] ECRI-625, esp. paras. 69 et seq.; opinion of Tesauro A-G in *Case C-53/96. Hermes International v. FHT Marketing Choice BV* [1998] ECRI-3603, paras. 14, 20.

[365] See para. 211 below.

[366] To use the words of Special Rapporteur Ago, *Yearbook ... 1970*, vol. II (Part Two), p. 306, para. 66 (c), cited in First Report, A/CN.4/490, para. 13. For a discussion of the distinction, see ibid., paras. 12–18.

Article 27, at least, seems to do that, even though it does so by reference to the wrongful act by another State.

165. This aspect of Chapter IV is neither stressed nor excused in the commentary, which says only that Chapter IV is concerned with cases where one State is implicated in the internationally wrongful conduct of another.[367] But it may be justified in that responsibility under Chapter IV is, in a sense, derivative.[368] In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the "general part" of the law of civil or criminal obligations, as the case may be. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in Chapter II. In certain circumstances, it may be justified to attribute the wrongfulness of State A's conduct to State B, which is implicated in that conduct because of assistance given or direction or coercion exercised. Depending upon the scope of the responsibility defined by Chapter IV, it is thus possible to defend articles 27 and 28 as falling within the scope of a draft concerned with the secondary rules of State responsibility. Care is needed to ensure that the articles do not go beyond the scope of "implication", turning into substantive and possibly controversial primary rules. Whether they do so, however, depends upon their content rather than their classification.

### 2. Review of specific articles

#### (a) Article 27: Aid or assistance by a State to another State for the commission of an internationally wrongful act

166. Article 27 provides as follows:

> "Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation."

167. Literally interpreted, article 27 posits a rather extensive principle of responsibility of one State for the acts of another. It treats as wrongful any "aid or assistance ... rendered for the commission of an internationally wrongful act" carried out by the second State. The "mental element" of assistance is not specified in the article: what degree of awareness is required that the assisted State is engaging in an internationally wrongful act? Nor is any distinction made between degrees or types of "aid or assistance", which might vary from the indispensable to the incidental.

168. The commentary to article 27 clarifies these matters considerably. First it distinguishes between participation in the wrongful act of another State and cases where "a State is or becomes a co-perpetrator of an internationally wrongful act".[369] Then it distinguishes between cases of advice, encouragement or incitement, on the one hand, and cases of actual assistance. "In the international legal order ... it is more than doubtful that the mere incitement by one State of another to commit a wrongful act is in itself an internationally wrongful act."[370] Incitement is thus to be distinguished from complicity, especially in

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[367] Commentary to Chapter IV, para. (1).

[368] Cf. the term "responsabilité dérivée" as used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco*, UNRIAA, vol. 2, p. 615 (1924), at p. 648.

[369] Commentary to article 27, para. (2).

[370] Ibid., paras. (3), (4), citing the conclusions of the United States-French Commissioners of 1836, refusing to hold France responsible for acts of Denmark done under its influence and incitement but nonetheless independently. See Moore, 5 *International Arbitrations* ... (1898), pp. 4473 *et seq.*

international relations. For different reasons, cases of direction and coercion are also distinguished from complicity, and are dealt with in article 28. Thus article 27 is concerned with the case where the one State acts alone, and is primarily responsible, but another State materially assists it in the commission of a wrongful act.[371]

169. The commentary notes that certain forms of assistance are independently prohibited by international law. For example, the General Assembly's Definition of Aggression defines as aggression, *inter alia*, "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State".[372] But according to the commentary, aiding and assisting the wrongful act of another State is itself wrongful, even though this is not expressly stated in any primary rule. Indeed, this is the case, irrespective of whether the principal act is a crime or a delict,[373] or of whether the aid or assistance itself constitutes a wrongful act.[374] It is sufficient that the assisting State has "an intent to collaborate in the execution of" a wrongful act. This is satisfied, for example, where the assisting State has "knowledge of the specific purpose for which the State receiving certain supplies intends to use them".[375] Most of the examples of State practice given in the commentary involve assistance by one State in a use of armed force by another, e.g., through allowing overflight or landing rights in the course of a military operation by another State which is said to constitute aggression or intervention.[376] It should be noted that all of the examples given involve the breaches of obligations arising under primary rules by which the assisting State was itself bound.

170. Thus the Commission concluded, partly as a matter of progressive development, that a general rule prohibiting complicity or participation in the wrongful act of another State should be included in Part One.[377] Such participation was not necessarily a wrong of the same gravity as the conduct assisted. Its gravity would depend, *inter alia*, on "the extent and seriousness of the aid or assistance actually furnished to the author of the principal wrongful act", and this was a further reason for distinguishing it from the principal act.[378] But for article 27 to apply, the assistance given had to be material, and it had to be given "with *intent* to facilitate the commission" of the wrongful act by the other State.[379] Moreover, the assisted State must actually commit a wrongful act, so that the illegality of the conduct of the assisting State was strictly dependent on that of the assisted State.[380]

*Comments of Governments on article 27*

171. Germany doubts whether existing international law goes as far as article 27, and calls for more precision both of the term "rendered for the commission of" and of the necessary element of intent.[381] The United States in substance agrees. [382]Switzerland argues that

[371] Commentary to article 27, para. (11).
[372] General Assembly resolution 3314 (XXIX), annex, para. 3 (f), cited in the commentary to article 27, para. (12).
[373] Commentary to article 27, para. (13).
[374] Ibid., para. (14).
[375] Ibid.
[376] Ibid.
[377] Ibid., para. (15).
[378] Ibid.
[379] Ibid., para. (16) (emphasis in original).
[380] Ibid., para. (19).
[381] A/CN.4/488, pp. 75–76.
[382] Ibid., p.77.

article 27 "has no basis in positive law" and should be deleted.[383] In an earlier comment, Sweden too questioned the breadth of article 27 as formulated, and queried whether it was not a primary rule.[384]

172. The United Kingdom, by contrast, supports the "basic principle" but raises a series of drafting points, which nonetheless raise issues of principle about article 27 as such. For the United Kingdom, the fundamental issue is the need to distinguish between cases where the act of the assisting State is independently wrongful and those where it is not. If it is independently wrongful, there is no need for article 27. If it is not, the principle of responsibility needs to be clearly expressed.[385] Japan likewise is supportive of article 27 but calls for a clearer definition of the principle.[386] In an earlier comment, Mali noted that various factors had to be taken into account in determining whether aid had been rendered "for the commission of an internationally wrongful act", but it nonetheless strongly supported the article.[387]

*Article 27 as a case of derived responsibility: two preliminary issues*

173. Article 27 provides for derived responsibility in two distinct ways. First, the assisting State is only responsible if the assisted State has actually committed an internationally wrongful act. As the commentary makes clear, the responsibility of the assisting State only arises if and when the assisted State carries out the wrongful act. Secondly, the assisting State is only responsible if it is established that the assistance was "rendered for the commission of an internationally wrongful act". What is required is a specific intent to assist in the commission of the wrongful act by the assisted State. This raises questions both of definition and of principle, but two preliminary difficulties should first be mentioned.

174. One is the procedural difficulty of establishing the responsibility of the assisting State in judicial proceedings in the absence of the assisted State. The International Court has repeatedly affirmed that it cannot decide on the international responsibility of State A if, in order to do so, "it would have to rule, as a prerequisite, on the lawfulness" of the conduct of State B, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.[388] By definition that principle will apply to cases under article 27, since it is of the essence of the responsibility of the assisting State that the assisted State has committed an internationally wrongful act. The wrongfulness of the assistance given by the former is dependent upon the wrongfulness of the conduct of the latter (as well as upon the former's awareness of its wrongfulness). But although this may present practical difficulties in some cases in establishing the responsibility of the assisting State, it is not a good reason for rejecting article 27. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings. Diplomatic protests have been made in cases of wrongful assistance given to another State, and this is proper, since States are entitled to assert complicity in the wrongful conduct of another State even though courts may be incompetent to rule on the charge in the absence of that other State. In addition, the principle does not always apply even in judicial proceedings. For example, it does not apply

[383] Ibid., p. 76.

[384] *Yearbook ... 1981*, vol. II (part 1) p. 77.

[385] Ibid., pp. 76–77.

[386] A/CN.4/492, p. 11.

[387] *Yearbook ... 1980*, vol. II (part 1) p. 101.

[388] *Case concerning East Timor, I.C.J. Reports 1995* p. 90 at p. 105 (para. 35); see also *Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 19 at p. 32; *Certain Phosphate Lands in Nauru, I.C.J. Reports 1992*, p. 240, at p. 261 (para. 55).

in cases where the responsibility of the assisted State has already been established by a competent international body.[389]

175. A second difficulty relates to the development of specific substantive rules prohibiting one State from providing assistance in the commission of certain wrongful acts by other States, or even requiring third States to prevent or repress such acts. Paragraph 3 (f) of the General Assembly's definition of aggression has been referred to above, and there are other examples.[390] These texts do not rely on any general principle of deri 1 responsibility. Do they, by implication, deny the existence of any general principle?[391] It does not seem so. Specific rules generated at different times prohibiting assistance to wrongdoing States may show the importance of preventing assistance in those contexts, but it goes too far to infer from them, *a contrario*, the non-existence of any general rule. It was not the function of the Definition of Aggression to deal with the general law of State responsibility, and to have remained silent on the point in formulating the text of article 3 would not have served the purpose of defining aggression. As to other treaty provisions (e.g., article 2, paragraph 5 of the Charter of the United Nations), again these have a specific rationale which goes well beyond the scope and purpose of article 27 of the draft articles.

176. For these reasons, neither the procedural difficulty presented by the *Monetary Gold* principle nor the existence of specific primary rules overlapping with article 27 in certain fields provides grounds for rejecting the general principle.

177. A much more serious objection, however, relates to the scope of the principle. According to the very cryptic formulation of article 27, the aid or assistance must be shown to have been "rendered *for* the commission of an internationally wrongful act", but the one word "for" raises a number of questions. When is assistance rendered "for" such a purpose? Assistance can range from the indispensable to the incidental: how significant must it be in achieving the purpose? Must the assisting State be fully aware not only of the purpose but also of its illegality? Beyond these questions of formulation and definition lie more basic issues. In particular, does it matter that the assisting State is not itself bound by the rule whose breach it helps to achieve? If not, can such assistance ever be justified? The range of examples given in the commentary to article 27 is relatively narrow, and is limited to breaches of fundamental rules such as Article 2, paragraph 4, of the Charter of the United Nations. But article 27 itself is not so limited. Is a general rule, applicable equally to bilateral treaties and to peremptory norms, desirable? Does it have a place in the draft articles?

*The problem of intention or knowledge of wrongfulness*

178. It is clear that to impose on the assisting State a standard of strict responsibility is too harsh. A State providing material or financial aid to another should not be required to take the risk that the aid wil' be used to carry out an internationally wrongful act. In any event, it can be very difficult to show that particular resources were so used — especially financial

[389] In the *Case concerning East Timor*, Portugal argued that the legal position of Indonesia had already been authoritatively established by earlier resolutions of the Security Council and the General Assembly. The Court denied that the resolutions went so far: *I.C.J. Reports 1995*, p. 90, at p. 104 (para. 32). By implication, a clear and binding resolution of a competent organ might avoid the *Monetary Gold* principle: cf. *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 16, at p. 54 (para. 117).

[390] See para. 169 above. See also Charter of the United Nations, Article 2 (5) ("All Members shall ... refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action").

[391] See the comments of Switzerland and Germany, para. 171 above.

resources or information. The commentary to article 27 stresses that the responsible organs of the assisting State must be aware that the assistance will be used for an unlawful purpose and must intend that result. In other words, the assistance must be given:

> "with the specific object of facilitating the commission of the principal internationally wrongful act in question ... [I]t is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act. Nor is it sufficient that this intention be 'presumed'; as the article emphasizes, it must be 'established'."[392]

The explanation is helpful, but it is clear that, if article 27 is to be retained, these requirements should be expressed in the text of article 27 and not only in the commentary.[393] Given the nature of inter-State relations and the great diversity of situations which may be involved,[394] article 27 should cover only those cases where the assistance is clearly and unequivocally connected to the subsequent wrongful act. So far as the element of "intention" is concerned, this means that the relevant State organ(s) must have been aware that the conduct in question was planned, and must further have intended, by the assistance given, to facilitate its occurrence.

179. There is a further question as to intention. Must the assisting State not only be aware that the conduct will occur, but also know of its internationally wrongful character? Does "ignorance of the law" by the State officials who give the aid or assistance excuse the assisting State? Ignorance of international law is not generally an excuse for wrongful conduct by States. Is it, exceptionally, an excuse in the context of article 27? If so, does the assisting State have a duty of reasonable inquiry as to the illegality, or is it sufficient to exonerate it that the relevant officials turned a blind eye to the illegality? These are difficult questions,[395] and they are, moreover, substantive questions. It is proposed to return to them below.[396]

*The nexus between assistance and wrongful act*

180. A second issue, which is not resolved by any definition of intention, relates to the link required between the assistance and the wrongful act. A State might intend to assist in a wrongful act, fully aware of the circumstances, yet its assistance might be really irrelevant, amounting to little more than incitement or encouragement (which article 27 does not seek to cover). On the other hand, the assistance might be vital, as with the provision of a forward military base or refuelling facilities to aircraft otherwise out of range of their target. According to the commentary, "the aid or assistance must have the effect of making it *materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful act".[397] In principle this must be correct. To require that the aid should have been an indispensable prerequisite to the wrongdoing would invite speculation

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[392] Commentary to article 27, para. (18).

[393] See the comments of various Governments to this effect, paras. 171–172 above.

[394] E.g., the use of military bases or of territory generally, overflight, military procurement, economic aid, training of personnel, provision of confidential information, etc..

[395] Despite Article 102 (1) of the Charter, one State cannot be expected to be aware of the bilateral treaty obligations of another. If notice of wrongfulness is required, a formula analogous to article 46 of the Vienna Convention on the Law of Treaties would be appropriate.

[396] See paras. 184–186 below.

[397] Commentary to article 27, para. (17) (emphasis in original); cf. ibid., para. (18).

as to other contingencies, and might create loopholes to the application of the rule.[398] But the term "materially" is problematic, if only because of its connection with the notion of "material breach" under article 60 of the Vienna Convention on the Law of Treaties, which is defined as "the violation of a provision essential to the accomplishment" of the treaty. If the aid or assistance does not have to be essential to the accomplishment of the wrongful act, the word "materially" should be avoided. On balance it is sufficient to use the term "aids or assists", and to explain it in this sense in the commentary.

*Must the assisting State be bound by the primary rule in question?*

181. Even assuming a satisfactory formulation of article 27 along the lines explained in the commentary, substantive issues remain. As currently formulated, article 27 would cover assistance by State A in the breach of an obligation by State B to which State A is not privy. As article 17 makes clear, the draft articles cover breaches of treaties as well as of obligations under other sources of international law. They cover breaches of obligations under unilateral commitments or bilateral treaties as well as obligations *erga omnes*.[399] Yet it is far from clear that the same rule prohibiting assistance should apply to these different cases.[400] Take the case of a bilateral treaty between State B and State C under which the two States agree not to export certain materials or technology to, or not to trade with, State A. In the language of national trade practices law, this is a secondary boycott. State A, the target State, is of course not bound by the treaty.[401] Why should it be legally responsible if, knowing of the treaty, it assists State C in breaching? Article 27 could thereby become a vehicle by which the effect of well-publicized bilateral obligations was extended to the rest of the world. The position is surely different if the assisting State *is* bound by the primary rule, for example, if a party to a nuclear non-proliferation treaty assists another party in acquiring weapons from a third State in breach of the treaty. This suggests that article 27 should be limited to obligations which are binding upon or opposable to the assisting State.

182. One possible argument for the broader formulation of article 27 derives from analogies with national law. Under many national legal systems it is a civil wrong knowingly to assist another person in violating the latter's contractual obligations.[402] No doubt analogies with national law can be misleading, but the existence of a general principle of liability for inducing breach of contract could provide support for the breadth of article 27. The annex to the present report (see A/CN.4/498/Add.3) contains a brief comparative survey of the legal position with respect to inducing breach of contract in some national legal systems.

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[398] To similar effect, see Quigley, loc. cit. (note 297 above), at pp. 121–122.

[399] See paras. 17, 20–21, 26 above.

[400] As noted by Sweden in an earlier comment: *Yearbook ... 1981*, vol. II (Part One), p. 77.

[401] See Vienna Convention on the Law of Treaties, 1969, articles 34–35.

[402] The issue is not discussed in the commentary, or indeed in the literature generally. C. L. Bouvé, "Russia's Liability in Tort for Persia's Breach of Contract", *American Journal of International Law*, 6 (1912), p. 383 discusses a case of responsibility of a State for inducing, by coercion, a breach of a State's contract with a national of a third State, which is a different issue. Sir Hersch Lauterpacht relied on municipal analogies in arguing for the invalidity of a later treaty conflicting with an earlier one: see "The Covenant as the 'Higher Law'" (1936) 17 *British Year Book of International Law* 54; "Contracts to Break a Contract" in E. Lauterpacht (ed.), *International Law, being the Collected Papers of Hersch Lauterpacht* (Cambridge, 1978), p. 341, at pp. 374–375. *A fortiori* he would have supported the view that inducing breach of a bilateral treaty is a delict. His position as to the invalidity of conflicting treaties was, however, not accepted in the Vienna Convention on the Law of Treaties. Instead questions of State responsibility arise for the State with conflicting obligations: see paragraph 9 above, and S. Rosenne, *Breach of Treaty* (Grotius, Cambridge, 1985), pp. 87–89, 93.

The survey suggests that, while there is some comparative support for a general principle creating liability for inducing breach of an agreement with a third party, this support is heavily qualified. First of all, the principle is not recognized in some legal systems (e.g., those based on Islamic law), and only to a very limited extent by others (e.g., German law). In those systems where it is recognized in principle (e.g., French law, the common law), it is subject to important qualifications. In particular, the contract concerned must be lawful, the interference with it must be intentional and there must be no independent justification for the interference.

183. Moreover, even if the support to be drawn from domestic analogies such as inducing breach of contract were less equivocal than it is, there are difficulties in applying such a general principle to international relations. Treaties reflect the particular policies of the States entering into them, and international law has a strict doctrine of privity in relation to treaties. Moreover, treaties have proliferated, and many obligations to provide finance, materials or technology are incorporated in treaties. National legal systems have more rigorous controls on the legality of contracts than international law currently has for treaties,[403] and there are ways under national law by which third parties can challenge the legality of contracts adversely affecting them which do not yet exist for treaties.[404]

184. All these considerations suggest that the principle in article 27 cannot be applied to bilateral obligations in an unqualified form. Take a case where finance or goods are to be provided pursuant to a treaty by State A to State B, and State A realizes that to comply with the treaty will produce a breach of State B's obligation to State C. Under international law both treaties are presumably valid, although this is without prejudice to the international responsibility of State B. In such circumstances, why should State A be the judge of State B's compliance? If State B insists upon performance of its treaty with State A, is State A entitled to refuse? Yet under article 27, it would appear that if State A knowingly provides the assistance, it is responsible to State C.[405] Or take a case where a few States, the only producers of a particular strategic good or raw material, enter into a treaty to limit sales and increase prices. Why should purchasers, who are not bound by that treaty, be potentially liable for inducing one of the treaty parties to sell to them at a reduced price?

*Conclusions on article 27*

185. There is a case for the deletion of article 27, on the ground that it states a primary rule and thus falls outside the scope of the draft articles.[406] Certainly, if the breadth of the article is to be maintained, it would be necessary to address the questions identified above, for

[403] E.g., in the context of competition law, *ultra vires* contracts of public authorities, contracts offending public policy, etc. For a comparative review see A. von Mehren, "Contracts in General", in: *International Encyclopedia of Comparative Law*, vol. VII, ch. 1, pp. 29–40; P. D. V. Marsh, *Comparative Contract Law. England, France, Germany* (Gower, Aldershot, 1993) pp. 87, 91, 99–100.

[404] Under articles 65 and 66 of the Vienna Convention on the Law of Treaties, the procedure for invoking *jus cogens* to invalidate a treaty is apparently available only to the parties to the treaty in question, not to affected third States. In the *Case concerning East Timor, I.C.J. Reports 1995*, p. 90, Portugal did not purport to challenge the validity of the 1989 Treaty. See paras. 9 and 174 above.

[405] It might be argued that State A's intention here is not to injure State C, but rather to comply with its obligations to State B. The fact remains that State A knows that its assistance will produce a breach of State B's obligation. Refined judgements of the "intention" of States, based on casuistical doctrines such as "double effect", are not a very secure basis for State responsibility. A broad rule such as that specified in article 27 could only work satisfactorily if it were open to the assisting State to justify its assistance, e.g., on the ground of an equally valid moral or legal duty. But to enact a principle of justification would plainly involve legislating in the field of the primary rules of responsibility.

[406] Cf. Switzerland's comments, para. 171 above.

example, as to the awareness of the assisting State of the legal obligations of the assisted State, or as to the existence of possible justifications for action in cases where there are conflicting obligations. Whatever view may be taken on these issues, it seems clear that they are substantive ones, which fall outside the scope of the secondary rules of State responsibility.

186. On the other hand, article 27 may be justified in the framework of Chapter IV if it is limited to aid or assistance in the breach of obligations by which the assisting State is itself bound. It may be that the assisting State should not be required to judge the legal obligations of the assisted State, but it has notice of and must take responsibility for its own legal obligations. For State A deliberately to procure the breach by State B of an obligation by which both States are bound cannot be justified; a State cannot do by another what it cannot do by itself. Seen in this more limited light, the inclusion of article 27 in the draft articles can be justified, since it deals with the implication of one State in the commission of a wrongful act by another — that is to say, an act which is wrongful so far as both States are concerned.[407] For all these reasons, article 27 should be retained, but it should be limited to cases where the aid or assistance is given by the assisting State with knowledge of the circumstances of the internationally wrongful act; the aid or assistance materially advances the commission of that act, and the act in question would have been internationally wrongful if committed by the assisting State itself.[408]

### (b) Article 28: Responsibility of a State for an internationally wrongful act of another State

187. Article 28 provides as follows:

> "1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.
>
> "2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.
>
> "3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other provisions of the present articles, of the State which has committed the internationally wrongful act."

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[407] This conclusion is consistent with criticisms in the literature of the breadth of article 27, although the specific solution proposed is slightly different. Thus Padeletti, op. cit. (see note 297 above) would limit article 27 to obligations *erga omnes*, in view of their importance and of the fact that all the limited practice relates to such obligations. But other multilateral obligations are also important; why should parties to a multilateral treaty be able to assist each other to do what neither could lawfully do alone? Graefrath, op. cit. (see note 297 above) would also limit complicity to wrongful acts which affect the international community as a whole, and would create a presumption of intent to assist. The proposal in the text retains the element of intent, which can be demonstrated by proof of rendering aid or assistance with knowledge of the circumstances. Quigley, op. cit. (see note 297 above) generally supports article 27 as drafted, but advocates imposing upon the assisting State a duty of care to ensure that aid is not used for illegal means in case of doubt. He fails, however, to address the problem of obligations by which the assisting State is not bound.

[408] For the proposed text of article 27, see para. 212 below.

*Comments of Governments on article 28*

188. Switzerland points to the need for coordination between this provision and the provisions of Chapter V dealing with coercion or duress.[409] France notes that paragraph 1 reflects "a historically dated situation": in paragraph 2, the term "coercion" is too wide, and should be limited to coercion contrary to international law.[410] In an earlier comment, Mongolia doubted "the appropriateness of the present drafting" of article 28, and especially the unqualified use of the term "coercion".[411]

189. Article 28 deals with two distinct cases, one involving situations of dependency (e.g., international protectorates or belligerent occupation), and one involving cases of coercion of one State by another. It is necessary to deal with them separately.

*Article 28 (1): Responsibility arising from actual or potential direction or control*

190. The commentary to paragraph 1 points to three different cases where there may be a relationship of dependency between one State and another, such as to warrant treating the dominant State as internationally responsible for the wrongful acts of the dependent State. These are: (a) international dependency relationships, especially "suzerainty" and international protectorate; (b) relationships between a federal State and States members of the federation which have retained their own international personality; (c) relationships between an occupying State and an occupied State in cases of territorial occupation.[412] It contrasts these with situations of pure representation, where one State has assumed, even on an exclusive basis, responsibility for representing another State in international relations, but without any power of direction or control over the decision-making process of the dependent State.[413]

191. As to cases of international dependency (such as international protectorates), the commentary cites the decision of an arbitral tribunal in the *Robert E. Brown* case in support of the proposition that "indirect responsibility ... should be attributed to a State for an internationally wrongful act committed by another State which is linked to it by a relationship of dependence, when the wrongful act complained of has been committed in an area of activity in respect of which the dominant State has effective power of control over the dependent State, and in that case only".[414] Such situations are admittedly dated, but according to the commentary this is no reason not to include such a well-established rule in the draft articles.[415]

192. As to relationships between a federal State and its component units possessing separate international personality, the commentary applies similar reasoning to conclude that "the federal State should be responsible for internationally wrongful acts attributable to the member State if they were committed in a sphere of activity subject to the control or direction of the federal State", but not otherwise.[416]

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[409] A/CN.4/488, p. 78.

[410] Ibid.

[411] *Yearbook ... 1981*, vol. II (Part One), p. 76.

[412] Commentary to article 28, para. (10).

[413] Ibid., paras. (5)–(8), distinguishing the decision of Arbitrator Huber in *British Claims in the Spanish Zone of Morocco*, UNRIAA, vol. 2, p. 615 (1924), at p. 648, on the basis that the relationship between Spain and Morocco was not one of mere representation.

[414] Commentary to article 28, para. (14), citing *Robert E. Brown (United States) v. Britain*, UNRIAA, vol. 6, p. 120 (1923) at pp. 130–131.

[415] Ibid., paras. (15)–(17).

[416] Ibid., para. (18).

193. Finally, as to belligerent occupation, the same rule is again affirmed, relying on earlier diplomatic precedents as well as on the decision of the Franco-Italian Conciliation Commission in the *Duc de Guise* case.[417] In such cases the occupying State is responsible for the acts of the occupied State provided "(a) that the occupied State continued to exist as a separate subject of international law; and (b) that the internationally wrongful act was committed by the occupied State in an area of activity in which that State was subject to the direction or control of the occupying State". This is so, irrespective of the legality of the occupation.[418]

194. The general rule in article 28 (1) is formulated on the basis of these three situations. According to article 28 (3), the responsibility of the dominant State is without prejudice to the responsibility of the dependent State, although the wrongfulness of the latter's conduct might be attenuated or even precluded under Chapter V, e.g., because of *force majeure*.

*The proper scope of paragraph (1) in the framework of the draft articles*

195. A wide range of dependency relationships is discussed in the commentary. But it must be stressed that Chapter IV is only concerned with the responsibility of one State for the conduct of another State, and this has implications for the scope of article 28 (1).

- *Exclusion of dependent territories or component units of federal States which are not themselves States*. In most relationships of dependency between one territory and another, the dependent territory, even if it possesses some international personality, is not a State. This is equally true of existing federal States. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right (and not by delegation from the federal State), the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other States. The normal principles specified in articles 5 and 10 of the draft articles apply,[419] and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal Constitution.[420]
- *Disappearance of older cases of international dependency*. A further limitation on the scope of article 28 results from developments in international relations since the 1970s. Almost without exception, the older international dependency relationships have been terminated (as with the British protected States in the Arabian peninsula). Those that remain have mostly been reformulated so as to reduce or eliminate areas of uncertainty or dependency.[421] The links between, for example, Italy and San Marino, Switzerland and Liechtenstein or New Zealand and Western Samoa are based on representation, and do not involve any legal right to direction or control on the part of the representing State. As the commentary to article 28 emphasizes, in pure cases of representation the represented entity remains responsible for its own international

[417] See (1951) 18 ILR p. 426.

[418] Commentary to article 28, para. (24).

[419] See First Report, A/CN.4/Add.5, paras. 256–262.

[420] As the International Court had occasion to emphasize in the *La Grand case (Germany v. United States of America)*, Order of 5 March 1999, para. 28. See also B. R. Opeskin, "International Law and Federal States", in B. R. Opeskin and D. R. Rothwell (eds.), *International Law and Australian Federalism* (Melbourne, Melbourne University Press, 1997), p. 1.

[421] See J. Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge, Cambridge University Press, 1996) for details in relation to the European micro-States, which are now all Members of the United Nations.

obligations, even though diplomatic communications may be channelled through another State.[422]

196. Nonetheless, instances exist, or can still be envisaged, where one State has the power to direct or control the activities of another State, whether by treaty, or as a result of a belligerent occupation, or for some other reason, and thus the issues raised by article 28 (1) do need to be addressed. Article 9 of the draft articles deals with the situation where the organ of one State is placed at the disposal of another, so that it acts under the sole direction or control of the receiving State.[423] Article 28 (1) is concerned with what is almost the converse situation, where the organs of a dependent State are subject to the direction or control of another State in breaching international obligations owed by the dependent State to a third State.

*Is the criterion for implicated responsibility actual direction or the power to direct?*

197. The first point is that article 28 (1) takes as the criterion for responsibility not only actual direction or control but also the power to direct or control. If the conduct occurred "in a field of activity in which [the dependent] State is subject to the power of direction or control of another State", then the responsibility of the other State is engaged. There is, however, little authority for such a wide rule in cases where the "dependent" State survives as a separate State in international law.[424]

- *The Robert E. Brown claim.* The Arbitral Tribunal in this case held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, "fell far short of what would be required to make her responsible for the wrong inflicted upon Brown". It went on to deny that Great Britain possessed power to interfere in matters of internal administration. But it also said that there was no evidence "that Great Britain ever did undertake to interfere in this way". Accordingly the relation of suzerainty "did not operate to render Great Britain liable for the act complained of".[425] The commentary infers that the existence of a mere power to interfere, even if not exercised, would have been enough to attract British responsibility, but the Tribunal did not actually say that. It was sufficient for its purposes to hold that there was neither a power to intervene nor any commitment by Great Britain to do so.

- *The Duc de Guise claim.* The Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a time when it was under Allied occupation. But it did not base its decision on the absence of Allied power to requisition the property, or to stop Italy from doing so (which power certainly existed at the time). Rather the majority pointed to the absence in fact of any "intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees".[426] In other words, the focus was on the exercise of power rather than its mere existence.

- *Drodz & Janousek v. France and Spain.* This decision of the European Court of Human Rights was discussed in the context of article 9.[427] The majority of the Court

[422] Commentary to article 28, para. (4).

[423] See First Report, A/CN.4/Add.5, paras. 222–234.

[424] If the separate legal personality of the dependent State is not maintained, the case falls outside the scope of Chapter IV altogether.

[425] UNRIAA, vol. 6, p. 120 (1923), at pp. 130–131.

[426] See (1951) 18 ILR p. 426, discussed in the commentary to article 28, para. (22).

[427] ECHR Ser. A vol. 240 (1992), discussed in First Report, A/CN.4/490/Add.5, paras. 228–229.

held that France was not responsible for decisions of the courts of Andorra, unless by its own participation in them, or by its subsequent endorsement and implementation of a flagrant denial of justice, it assumed its own responsibility for them.[428] Unlike the minority, the Court was not prepared to infer French responsibility from the existence of any reserve powers France then may have possessed (itself or through the French co-prince), in the absence of any evidence of actual interference on its part.

198. These and other cases[429] do not support the broad proposition that whenever one State has the power to prevent another from committing an internationally wrongful act, it is responsible for failing to do so. Moreover, that proposition is undesirable in principle, since it would place a premium on intervention in the affairs of "dependent" States which are, *ex hypothesi*, still responsible for their own wrongful acts.[430] Of course, the dominant State will have obligations of its own in relation to a dependent State or to territory under its control or occupation. But the mere fact of its having power over the dependent State in some field is not a sufficient basis for imputing to it all the wrongful acts of the dependent State in that field.[431] Article 28 (1) should be limited to cases where a dominant State actually directs or controls conduct which is a breach of an international obligation of the dependent State.

*Must the obligation breached be opposable to the dominant State?*

199. Since the dominant State must direct or control the commission of the wrongful act, there is no need to specify further a nexus between its conduct and that of the State committing the wrongful act (as was necessary for article 27).[432] Two questions do remain, however. What information must the dominant State have of the circumstances amounting to the wrongful act which it directs or controls? Must the dominant State itself be bound by the obligation which is transgressed? The former question really only arises if a negative answer is given to the second. If the directing State is only to be responsible for conduct which would have been wrongful for itself, it will be on notice that the conduct it is directing another State to perform is or may be wrongful. On the other hand, if that State is to be considered as indirectly "bound" by the international obligations of the dependent State, the position may be different.

200. On this issue the position seems less clear than it was for article 27, since aid or assistance covers such a wide spectrum of cases and involves conduct which is very often neutral in character, whereas the concept of direction or control of wrongful conduct is already a more specific one. On balance, and for ease of application, the Special Rapporteur suggests that the same proviso be applied to article 28 (1) as to article 27. Thus the directing State should only be responsible for acts which would have been wrongful if it had carried out those acts itself. It should be stressed that this condition is of limited significance. All the cases referred to in the commentary or in the discussion of article 28 (1) involved

[428] Ibid., at para. 110 ("the Convention does not require the Contracting Parties to impose its standards on third States or territories"). See also *Iribarne Pérez v. France*, ECHR Ser. A, vol. 325C (1995).

[429] See, e.g., *Lighthouses Arbitration (Claims No. 11 and 4)* (1956), 23 ILR 81, esp. at p. 90.

[430] For the position where the directing State is exclusively responsible for the conduct of the external affairs of the dependent State, see *British Claims in the Spanish Zone of Morocco*, UNRIAA, vol. 2, p. 615, at pp. 648–649 (1924).

[431] It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal apparatus of State does not mean that control was not exercised in fact by an occupying Power. Cf. *Restitution of Household Effects belonging to Jews Deported from Hungary*, (1965) 44 ILR 301 at pp. 340–342.

[432] See para. 180 above.

conduct (e.g., breaches of human rights or of obligations to aliens) which would have satisfied this condition.

*Article 28 (2): Responsibility arising from coercing another State to commit an internationally wrongful act*

201. Article 28 (2) deals with cases of coercion of one State by another. For the coercing State to be internationally responsible, article 28 (2) requires that the wrongful act should have been committed "as the result of coercion exerted ... to secure the commission of that act". In other words, the act must actually have been committed, it must have been committed as a result of the coercion and this must have been intended by the coercing State. In such cases, the coercing State is implicated in the internationally wrongful act of the State which has been coerced.

202. There is a verbal difficulty with this formulation.[433] If the acting State has truly been coerced, it will have been subjected to "an irresistible force" and the wrongfulness of its conduct will be precluded by *force majeure* under article 31. It is odd to speak of the wrongfulness of a coerced act, when the coercion amounts to *force majeure*, which is a circumstance precluding wrongfulness. As noted in discussing article 16, there is a problem with the relationship of Chapter V to Chapter III, and the existing language of article 28 reflects that problem.[434] The proposal for article 28 set out below resolves the problem by referring to "an act which, but for the coercion, would be an internationally wrongful act".

203. Turning to the substance of paragraph (2), the commentary suggests that, despite the nature of coercion as a form of imposition of will on the part of the coercing State, nonetheless the act of the coerced State remains its own act. Even if the coercion is itself unlawful,

> "the act [of the coercing State] will not for all that be identical with the act committed by the coerced State against a third State. The responsibility of the coercing State for the internationally wrongful act committed by the State coerced can therefore only be described as responsibility for the internationally wrongful act of another State."[435]

In conformity with this view, the commentary makes it clear that coercion for the purposes of article 28 is not limited to unlawful coercion:

> "for the purposes of the present article, 'coercion' is not necessarily limited to the threat or use of armed force, and should cover any action seriously limiting the freedom of decision of the State which suffers it — any measure making it extremely difficult for that State to act differently from what is required by the coercing State."[436]

Although the commentary is clear on this point, the question whether coercion ought to be limited to unlawful conduct has been raised by a number of Governments.[437]

*Should coercion for the purposes of article 28 (2) be limited to unlawful coercion?*

204. The choice between the alternatives is affected by questions relating to the scope of article 28, and in particular the meaning of coercion. In the Special Rapporteur's view, coercion for this purpose is nothing less than conduct which forces the will of the coerced

[433] As noted by Switzerland: A/CN.4/488, p. 78; see para. 188 above.

[434] See paras. 11 and 14 above.

[435] Commentary to article 28, para. (28).

[436] Ibid., para. (29).

[437] See the comments of France and Mongolia, para. 188 above.

State, giving it no effective choice but to comply with the wishes of the coercing State. It is not enough that compliance with the obligation is made more difficult or onerous. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the coerced act make it more difficult for the coerced State to comply with some other obligation.

205. But if that is the correct understanding of article 28 (2), then it does not seem necessary to limit article 28 (2) to unlawful coercion. Most cases of coercion meeting the suggested definition will be unlawful, e.g., because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention (i.e., coercive interference) in the affairs of another State. But even if coercion may be lawful in certain cases,[438] article 28 (2) is concerned with the specific notion of coercion deliberately exercised to procure the breach of one State's obligation to another State. It is difficult to imagine any circumstances in which such coercion could be justified.

206. No doubt there are cases where a State is lawfully coerced. For example, a State may be compelled to withdraw from territory it has invaded by successful measures taken against it in self-defence. But the Charter does not envisage that measures will be taken in self-defence in order to coerce a State to breach a valid obligation to another State, so the hypothesis of self-defence can be excluded. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in Part Two of the draft articles, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.[439]

207. This analysis suggests that, having regard to the strictness of the conception of coercion underlying article 28 (2), it is unnecessary to limit that provision to coercion which is contrary to article 2, paragraph 4, of the Charter of the United Nations. By the same token, there is no reason why article 28 (2) should be limited to breaches of obligations by which the coercing State is also bound. If a State deliberately sets out to procure by coercion a breach of State B's obligations to State C, it should be held responsible to State C for the consequences. Moreover, in such a case, the wrongfulness of State B's conduct vis-à-vis State C will likely be precluded by distress or *force majeure*, so that State C's only remedy will be against State A. For these reasons, article 28 (2) should be retained, with appropriate drafting amendments to reflect the points made in the commentary.[440]

*Article 28 (3): Preserving the responsibility of the acting State*

208. Finally, paragraph 3 preserves the responsibility of the State which has committed the internationally wrongful act, albeit under the direction or control or subject to the coercion of another State. As noted by France, the same savings clause would be appropriate for article 27.[441] In addition, it should be made clear that the provisions of Part IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State.

[438] On the debate about the definition and lawfulness of coercion, see P. Reuter, *Introduction au droit des traités* (PUF, Paris, 3rd edn., ed. Cahier, 1995), paras. 271–274.

[439] See also the remarks of the International Court on the proper purposes of countermeasures in the *Case concerning the Gabcikovo Nagymaros Project*, *I.C.J. Reports 1997*, p. 7, at pp. 55–57 (paras. 83–87).

[440] See para. 203 above.

[441] A/CN.4/488, p. 78.

### 3. Conclusions as to Chapter IV

209. On balance there seems to be support for the retention of Chapter IV as such, and for the main elements in articles 27 and 28, but with the clarifications and limitations that have been explained above. To summarize, all three bases of implicated or derived responsibility need to be articulated further, largely incorporating explanations given in the commentary, but also, in the case of articles 27 and 28 (1), limiting responsibility to cases of obligations opposable to the assisting or directing State. Since articles 27 and 28 (1) have more in common with each other than they do with article 28 (2), they could conveniently be combined in a single article, leaving the distinct issue of coercion to be dealt with in article 28.

210. The remaining issue is whether other elements of ancillary or inchoate responsibility ought to be included in Chapter IV. In some national legal systems, complicity and "indirect responsibility" are associated in a chapter of the law with other forms of accessory responsibility such as incitement, conspiracy and attempt. This is a field where national legal traditions diverge substantially. But one common feature appears to be that ancillary responsibility is more a feature of criminal law than it is of civil law.[442] So far as international law is concerned, if there is to be a developed distinction between international crimes and international delicts, one might expect that ancillary responsibility would likewise be more extensive for crimes. But in common with the rest of Part One (other than article 19 (2)–(4) itself), Chapter IV makes no such distinction.

211. Cases of inchoate responsibility do not involve the implication by one State in the wrongful conduct of another, and do not therefore fall within the scope of Chapter IV. In any event, there does not seem to be any general international law rule dealing with attempts to commit wrongful conduct.[443] Other possibilities should, however, be briefly referred to.

- *Incitement*. Conduct by a State in inciting another to commit an internationally wrongful act was deliberately excluded from Chapter IV. Only if it materially assists or actually directs or coerces another State to commit a wrongful act is a State implicated in that act.[444] This position seems to have been approved in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, where the Court noted that it was not concerned with "the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement".[445]
- *Conspiracy*. Where two States conspire to commit an internationally wrongful act, it is usually in the context of the subsequent joint commission of that act. At least, one of the conspiring States may well aid or assist the other, and depending on the facts, the planning might itself constitute such assistance. However, there does not seem to be any need for a general concept of "conspiracy" in international law, and certainly there is no need for such a notion in Chapter IV.

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[442] The same is true of inchoate responsibility. Thus an attempt to commit a crime may be unlawful, whereas an attempt to commit a delict or to breach a contract is usually not. For the question when an internationally wrongful act is actually committed, as distinct from planned or prepared, see paras. 102–106 above.

[443] See paras. 104 and 106 above.

[444] See commentary to article 27, paras. (6)–(7). See also Quigley, loc. cit. (note 297 above) at pp. 80–81.

[445] *I.C.J. Reports 1986*, p. 14, at p. 129 (para. 255). See also, and more categorically, Judge Schwebel, dissenting, ibid., at p. 379 (para. 259) ("Customary international law does not know the delict of 'encouragement'").

- *Assistance given after the commission of the wrongful act.* In certain circumstances, assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that wrongful act by the former State. In such cases it may assume responsibility for that act pursuant to article 15 *bis* as provisionally adopted in 1998.[446] Again, however, there seems to be neither call nor need for a separately identified notion of "complicity after the fact" in Chapter IV. Specific problems (e.g., in the field of money-laundering) can be dealt with by appropriately tailored primary rules.

- *Other cases of joint or collective action by States.* Reverting to the catalogue of cases of possible joint or collective action by several States, set out in paragraph 159 above, the analysis contained in the commentaries to Chapter IV and in the present report does not identify any further situation which needs to be dealt with in this Chapter. Issues may arise, however, in terms of reparation for conduct caused jointly by two or more States. Such issues will be addressed in the context of Part Two of the draft articles.

212. For the reasons given, the Special Rapporteur proposes the following articles in Chapter IV:

## Chapter IV

## Responsibility of a State for the acts of another State

*Note. The earlier title for this chapter was "Implication of a State in the internationally wrongful act of another State". The new title proposed is both shorter and more accurate, since what the various cases in Chapter IV have in common is that State A is responsible for conduct which is actually performed by State B. Moreover, in the case where State B's conduct is coerced by State A, the wrongfulness of that conduct may be precluded so far as State B is concerned.*

### Article 27

### Assistance or direction to another State to commit an internationally wrongful act

A State which aids or assists, or directs and controls, another State in the commission of an internationally wrongful act is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

*Notes. 1. Article 27 as adopted on first reading covered all aid or assistance "rendered for the commission of an internationally wrongful act carried out by" the assisted State. Such aid or assistance was internationally wrongful even if, taken alone, it would not have amounted to a breach of an international obligation. As now formulated, article 27 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the*

[446] See First Report, A/CN.4/490/Add. 5, paras. 281–286.

*conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself. The first two limitations correspond to the intention of article 27 as adopted on first reading; the third is new. See paras. 177–186 above.*

*2. A State is not responsible for aid or assistance under article 27 unless the internationally wrongful act is actually committed by the assisted State. Article 27 does not address questions of the admissibility of judicial proceedings to establish the responsibility of the assisting State in the absence of or without the consent of the assisted State. See para. 174 above.*

*3. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act. On the other hand, mere incitement or encouragement, unaccompanied by aid or assistance, is not enough to give rise to responsibility under this article. See paras. 180 and 211 above.*

*4. The words "if it is established that", which appeared in article 27 as adopted on first reading, are unnecessary. It is clear from article 27 that each of the specified elements must be sufficiently established for ancillary responsibility to arise, quite apart from the general rule that State responsibility has to be established and is not to be presumed. See First Report, A/CN.4/490, paras. 36–38.*

*5. In addition, article 27 now covers the situation which was previously dealt with under article 28 (1), viz., where one State directs and controls another to breach its international obligation to a third State. The same qualifications apply to the conduct of a State in directing and controlling wrongful conduct as apply to aid or assistance, that is to say, the directing State must be aware of the circumstances making the conduct of the assisted State internationally wrongful, and the completed act must be such that it would have been wrongful had it been committed by the directing State itself. See paras. 195–200 above.*

*6. Although article 27 (1) used the term "direction or control" disjunctively, in the context of a narrower formulation of the principle, it seems desirable to limit the responsibility of a third State to cases where it "directs and controls" the conduct in question. By contrast with article 28 (1) as adopted on first reading, the direction or control must actually be exercised for responsibility to arise.*

**Article 28**

**Responsibility of a State for coercion of another State**

A State which, with knowledge of the circumstances, coerces another State to commit an act which, but for the coercion, would be an internationally wrongful act of the latter State is internationally responsible for the act.

*Notes. 1. Article 28 (2) as adopted on first reading dealt with coercion exercised by one State with a view to procuring conduct by another State which (if that State had not been coerced) would be a breach of that State's international obligations. It was not necessary that the coercion should have been independently unlawful, although in most cases it would be. This provision has been retained in a separate article. The commentary to former article 28 (2) made it clear that the coercing State had to be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct,*

*and although this requirement might be thought to be implicit in the notion of coercion to commit a wrongful act, it is now spelled out in the article.*

*2. In the circumstances where coercion is used for this purpose, there is no reason to require that the act in question would have been unlawful if committed by the coercing State itself. There can be no justification for coercing another State to violate an international obligation, especially since, in circumstances where coercion has been used, the acting State may well be able to rely on the coercion as a circumstance precluding wrongfulness, thereby depriving the injured State of a remedy. See paras. 204–208 above.*

**Article 28 *bis***

**Effect of this chapter**

This chapter is without prejudice to:

(a) The international responsibility, under the other provisions of the present articles, of the State which committed the act in question;

(b) Any other ground for establishing the responsibility of any State which is implicated in that act.

*Notes. 1. Article 28 (3) as adopted on first reading provided that that article was without prejudice to the responsibility of the State which had actually committed the wrongful act. This is equally true of article 27, and the savings clause has accordingly been applied to Chapter IV as a whole.*

*2. Chapter IV is also without prejudice to the application of any other rule of international law defining particular conduct as wrongful, and this is made clear in paragraph (b). See para. 208 above.*